SUPREME COURT
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UNITED STATES SUPREME COURT.

No. 10.

GEORGE M. BAYLY, INDIVIDUALLY AND AS EXECUTOR OF R. H. BAYLY, DECEASED, PLAINTIFF IN ERROR,

versus

THE WASHINGTON AND LEE UNIVERSITY.

Error to the Supreme Court of Louisiana,

BRIEF FOR DEFENDANT IN ERROR.

HENRY J. LEOVY,
For Defendant in Error.

UNITED STATES SUPREME COURT.

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I.—STATEMENT.

(1) On the 21st day of April, 1876, plaintiff in error filed an account of his administration of the estate of R. H. Bayly, deceased, in the Second District Court for the Parish of Orleans, and State of Louisiana. (R. pp. 1–5, and 6–13.)

(2) Defendant in error, a legatee under the last will and testament of the deceased, in conformity to the Louisiana practice, opposed the homologation of this

account, setting forth fifteen grounds of opposition, none of which require consideration in this Honorable Court, except the fifteenth, which is so brief that we transcribe it, as well as that portion of the prayer of the petition of opposition referring to said item, viz :

"XV. Opponent further opposes the following item in said account C, to-wit:

"Open account—Balance due Becnel Plantation by G. M. Bayly & Pond, as represented on schedule of composition in bankruptcy, $18,021.79."

"Opponent avers, that said executor had no right or authority whatsoever to allow the funds of said estate to remain in the possession of said commercial firm of Bayly & Pond, whereof he was a member, or to loan the funds of said estate to said firm, which he well knew to be in embarassed and failing circumstances ; and that said executor should be compelled to account for said amount as cash in hand."

"The premises considered, opponent prays that said accounts A, B and C, may be amended, * * * that the said item of $18,021.79, balance due Becnel Plantation by G. M. Bayly & Pond, may be so amended as to compel said executor to account for said amount as cash, etc." (R. p. 15)

(3) The parties went to trial upon the account and opposition, and upon the trial the following state of facts was proved :

G. M. Bayly, the plaintiff in error, is the brother and

executor of R. H. Bayly, deceased ; he was also a member of the commercial firm of Bayly & Pond, doing business at New Orleans, Louisiana. The firm of Bayly & Pond acted as factors for the Becnel Plantation, a sugar estate belonging jointly to the succession of said R. H. Bayly and to one M. A. Becnel. On March 3d, 1876, the firm of Bayly & Pond filed a petition in bankruptcy in the proper Federal court. At said date they were indebted to the Becnel Plantation in the sum of $18,021.79 ; on May 3d, 1876, a resolution of composition was adopted and ordered, by the court in which said bankruptcy proceedings were pending, to be approved and recorded.

See Testimony of J. E. Logan. R. pp. 19–20.

See Testimony of G. M. Bayly, R. pp. 22–23.

See Testimony of W. H. Ellis, R. p. 25.

Admission, R. p. 29.

(4) Upon the above facts the Second District Court for the Parish of Orleans rendered judgment, in so far as said item XV is concerned, in words and figures following, viz :

"It is further ordered that said opposition, in so far as said item XV is concerned, be sustained in so far as to decree that $18,021.79 is the amount due to the estate of R. H. Bayly, by the late commercial firm of G. M. Bayly & Pond of this city, and by G. M. Bayly & Byron M. Pond, the individual members of said firm, at the date that the said firm their petition in bankruptcy, in

the United States District Court for the District of Louisiana, and that said amount be accounted for, in due course of administration, by said executor, according to law. (R. P. 6.)

(5) From this judgment, defendant in error took an appeal to the Supreme Court of Louisiana. (R. p. 26).

(6) Plaintiff in error did not JOIN IN OR ANSWER THIS APPEAL.

(7) The Supreme Court of Louisiana amended the judgment of the Second District Court and decreed "that the sum of $18,021.79 is the sum due to the succession of R. H. Bayly by G. M. Bayly, the executor, and that the account for that sum as cash." (R. p. 32).

(8) From this judgment, G. M. Bayly, individually and as executor, has taken a writ of error to this Honorable Court. (R. p. 35).

Under the foregoing state of the facts and of the record, defendant in error maintains the following propositions, viz :

I.—This debt is one created whilst G. M. Bayly was acting in a fiduciary character, within the meaning of the bankrupt act, and would not be barred by a discharge in bankruptcy under § 33 of the Act of March 2d, 1867. R. S. of the U. S., § 5117.

II.—Such a debt is not barred by composition proceedings under § 17 of the amendatory Act of June 22d, 1874.

III.—Admitting this debt to be one which would be barred by a discharge in bankruptcy, still it is not barred by the composition proceedings herein, because one of the payments provided for by the composition resolution was never made.

I.

THIS DEBT IS ONE CREATED WHILST ACTING IN A FIDUCIARY CHARACTER, WITHIN THE MEANING OF THE BANKRUPT ACT, AND WOULD NOT BE BARRED BY A DISCHARGE IN BANKRUPTCY, UNDER R. S. OF THE U. S., § 5117.

Plaintiff in error devotes a considerable portion of his brief to the discussion of the question whether, or not, the sum of $18,021.79 was ever collected at all by the executor; whether, or not, the debt was liquidated and exigible at the date when Bayly became a bankrupt; whether, or not, it was due to the estate or to a judicial entity entirely distinct from it, viz: a partnership existing between it and a third person.

In answer to these discussions suffice it to say:

(1) The executor himself admits that the debt is due to the estate, and not to any third person, and that it was liquidated and exigible more than a month before his bankruptcy. See his own voluntary statements in reply to his own counsel. R. p. 22; R. p. 23.

(2) He has paid part of the debt to the estate. R. p. 24.

(3) The facts are found adversely to the executor by the State courts. R. p. 6 ; R. p. 32.

This Court will not review such findings of fact.

Melendy vs. Rice, 94 U. S. 796.

(4) The judgment of the Second District Court for the Parish of Orleans, determining these facts, has passed into the domain of the thing adjudged. From its judgment no appeal was taken by plaintiff in error, nor did he join in an appeal to the Supreme Court of the State, or pray for an amendment of the judgment. Upon this ground the Supreme Court of the State refused to inquire into the correctness of the judgment of the lower court, but limited itself to an examination whether, or not, the claim of defendant in error, that the debt should be accounted for as cash, was correct. (R. p. 32)

Assuming then, that the debt was due to the estate at the time when the executor became a bankrupt, the question arises whether, or not, it be one which would be barred by an ordinary discharge.

Plaintiff in error does not deny that a debt due by an executor is within the black list of the bankrupt act, but claims that G. M. Bayly, personally, owes the debt, not G. M. Bayly, executor. Suffice it to say, that the money became due to the estate as soon as the sugar was sold, and should have been immediately placed to its account. Inasmuch as a man cannot collect from himself, the court will presume that Bayly held the money in that capacity, in which alone he was entitled to hold it ; that

the character of factor ceased and that of executor began as soon as the sugar was sold. Any other construction involves a breach of duty by the executor, which no court should, for a moment, allow him to allege.

Chief Justice Brickell, in the case of Woolsey vs. Cade, 54 Ala. 378, uses language most pertinent to the case at bar :

"The trustee of an express trust, such as an executor, administrator, or guardian, or a mere collecting agent, cannot, without a dereliction of duty, more or less censurable, become indebted to his cestui que trust or to his principal. A fiduciary relation between him and the person he represents, exists previously to, and independent of the particular transaction from which a debt can originate. Because of his want of fidelity and his dereliction of duty, it may be just to withhold from him the relief intended only for the unfortunate. Trustees and agents, of the character of which we speak, cannot mingle with their own the funds they may receive in their representative character. If deposited in a bank, they must be deposited as trust funds. Mingling or depositing them as their own is a destruction of the means of tracing and identifying them, and is a conversion, rendering them absolutely liable."

And Chief Justice Manning, of the Supreme Court of Louisiana, in his opinion in this case, (R. p. 32,) says :

"The debt acknowledged to be due by the firm of Bayly & Pond is due by each of the members of that

firm, and G. M. Bayly, the executor, by mingling or depositing the funds of the succession as his own, or those of the firm, effected a conversion of them which rendered him absolutely liable for them."

We submit, that the debt is unquestionably one created by the plaintiff in error while acting in a fiduciary capacity.

II.

SUCH A DEBT IS NOT BARRED BY COMPOSITION PROCEEDINGS UNDER §17 OF THE AMENDATORY ACT OF JUNE 22D, 1874.

The executor maintains that the composition proceedings bar all debts whatsoever, even those included in the black list of the bankrupt act. In support of this proposition several authorities are cited.

Let us rapidly review them :

In re Bechet, 2 *Woods*, 173. In this case, no question arose as to the *class* of debts affected by composition proceedings. Judge Woods did not, and could not, decide anything, except that an application for a discharge is unnecessary and improper in cases where a composition has been effected. The court says that the composition is a *substitute* for the ordinary proceedings and discharge under the bankrupt act, not that it has any *different* or *greater* effect.

In re Haskell, 11 *B. R.* 164. The question, in this case, was whether the debtor was entitled to any discharge *at*

all, not as to the effect of the discharge if granted ; and the only point decided was that the composition section seems to have left the whole question of *discharge* or *no discharge* to the requisite number and amount of creditors. The question as to the *class* of debts affected by composition proceedings was not raised nor decided.

Wells vs. Lamprey, 16 *N. B. R.*, No. 5, Sept. 15, 1867, p. 205. This is a decision of the Supreme Court of New Hampshire, and we frankly admit that it meets the issue in this case, and that it favors the executor's proposition. We submit, however, that this decision is entitled only to that consideration which attaches to the unbiased opinion of any body of learned jurists, and that it does not show that amount of care and deliberation which the vast importance of the question demands.

Besides, the Court seems to lay great stress upon the fact that the composition in that case had been paid and accepted by the suing creditor, whilst in the case at bar, defendant in error has never taken any part whatever in the bankruptcy or composition proceedings. (Admission, R. p. 29.)

The New York Supreme Court holds, that a debt created whilst acting in a fiduciary capacity, is not discharged by a composition. 14 Hun. 120 ; 18 Hun. 567 ; 21 Hun. 114.

The construction of the statute which you are urged to adopt by the executor is, we submit, in plain violation of

the letter and spirit of the bankruptcy act, and of all principles of statutory construction.

The present Bankrupt Act of the United States, as well as all former ones, and the English Acts, from which our own have been copied, were and are founded upon the principle of affording relief to meritorious and unfortunate debtors. They are for the interest and convenience of commerce, and are intended to restore to a position of usefulness the merchant who, through business misfortunes, has been reduced to poverty and to despair.

They have always carefully excluded from their operation every debt tainted with the slightest element of embezzlement or of fraud, whether moral or merely constructive. They have ever insisted that the man who claims their merciful interposition should present himself with clean hands. To every defaulter, from the forger under criminal prosecution to the mere collecting agent who fails to account to his principal, they have ever cried, "*procul o procul.*"

Such has been the spirit of all bankrupt legislation with which we are acquainted. Yet the executor in this case insists that the whole policy of these laws has been suddenly changed. To support his position he relies, not upon any express repeal of the excepting clause in the bankrupt act, but upon a repeal to be implied from a loose generalization in a part of the law where the

"*mens legislatoris*" was directed to a totally different object.

We maintain that the construction for which we contend is the correct one, for the following reasons:

(1) All parts of the law should be construed together, *ut res magis valeat quam pereat.* The amendatory act repeals the original act, only in so far as the two acts are *inconsistent* with each other, and it is to be construed as a part of that original act. The construction which we advocate harmonizes all parts of the law, and gives effect as well to the composition section as to the excepting section; whilst the construction contended for by the executor totally annuls the latter section by a forced implication.

(2) General words, preceded or followed by special words, in the same or a subsequent clause, are qualified and restrained by the particular words. *Specialia generalibus derogant.* The "all creditors" of the amendment to §43 of the original act, (R. S. of the U. S., §5103) is limited by the exceptions of §33 of the said act, (R. S. of the U. S., §5117.)

(3) In construing the amendatory law we should consider three things: the old law, the evil, and the remedy. The old law provided, in all cases, for a distribution of the estate, by officers of the court. The evil to be remedied was the expense attending the administration by such officers, and the enormous sacrifices of the assets of the bankrupt, which inevitably occurred, and

which were ruinous to all parties in interest. The remedy applied consists in a provision authorizing the debtor to settle his indebtedness by payment of such an amount as his assets will allow, and as may be satisfactory to the larger number of his creditors. All parties are thus benefitted—the creditor, by getting his dividend himself, instead of seeing it squandered in law costs and charges; the debtor, by retaining the administration of his estate, which he is better able to realize than any one else. Such was the evil, and such the remedy. The amendment was never intended to, and did not, in any manner, affect the classes of debts which were excluded from the operation of the act.

(4) Regard should be had to the context. The composition section is an addition to § 43 of the old act of 1867. That section stood at the end of the provisions as to the manner of distributing the estate, and has no reference to, or connection with the provisions as to the discharge of the debtor. The subject is logically developed by the old act and the amendments, as follows:

(*a*) Provisions for distribution of the estate by assignees.

(*b*) Provisions for distribution of the estate by trustees.

(*c*) Provisions for settlement by a composition.

(5) The construction contended for by the executor is monstrous, and leads to absurd conclusions. It protects the thief or forger, as well as the factor or the

executor. Its places it in the power of a trustee to use the trust fund itself, in order to purchase a discharge from his other creditors, and then to escape all liability for the embezzlement of that fund! No construction of the law, which admits of such absurd results can be the true one.

III

ADMITTING THIS DEBT TO BE AN ORDINARY ONE, STILL IT IS NOT BARRED BY THE COMPOSITION PROCEEDINGS HEREIN, BECAUSE THE PAYMENTS PROVIDED FOR BY THE COMPOSITION RESOLUTION WERE NEVER COMPLETED.

(1) As to the facts—They are undisputed. The *Executor's Testimony* shows conclusively the non-execution of the composition agreement; and so does the *admission annexed to transcript*, showing date of composition. From this evidence it appears that the last instalment due under the composition resolution was unpaid and untendered, many months after the time when it was due. See R. p. 24; R. p. 29.

(1) As to the law—We shall first call attention of the Court to two English cases, decided under a law, substantially identical with our own, and upon which our own is founded.

Edwards vs. Coombe, 7 *L. R. C. P.* 522. In this case the court held it to be competent for a creditor to sue for his original debt, where the debtor failed to pay or tender his composition within the time agreed upon or a reasonable time. The Court says: "It is the *composition*

which is to be accepted, not the mere *agreement* of the other creditors," and again, "In this case, I think that the non-payment of the composition was the failure of a condition going to the whole root of the arrangement, and that the original debt remains, and may be resorted to, notwithstanding the resolution."

In re Hatton, 7 *L. R. Ch. App.* 725. This case is to the same effect. The Court uses this language: "Where they (the creditors) agree to accept a composition, the debtor is not *discharged* unless he pays the composition, for that is the only thing which compels him to pay it, and that is the only hold which the creditors have upon him."

We now turn to the American cases:

In re Hurst, 13 *B. R.* 455, *S. C.* 3 *Cent. L. J.* 78. U. S. Circ. Ct. E. D. Michigan—Emmons, J. "The composition will not be effective to *discharge* the debtor unless the amount agreed upon is actually paid." The Court then refers to the two English cases above cited, and to "the numerous American and English adjudications which hold that, in all similar cases, deeds of composition and accord and satisfaction must be fully executed in order to be operative."

In re Reiman & Friedlander, 13 *B. R.* 129, *S. C.* 12 *Blatch.* 567. This is a decision by Judge Hunt, of the Supreme Court of the U. S., sitting on his circuit, and is to the same effect as the above. Here again, the

English cases cited by us are referred to in terms of the highest approbation.

Our adversaries seem to admit the force of the decisions last cited by us ; but claim that any proceedings to enforce the liability must be in the bankrupt court, which is exclusively seized of jurisdiction. We have been referred to a decision of Judge Billings, of the U. S. District Court for the District of Louisiana, in support of this proposition. We submit that the position is clearly erroneous.

The English cases which we have last cited are directly in point. *Edwards vs. Coombe* was an action of debt in a common law court. A plea was filed setting up a composition resolution, duly adopted by creditors. A replication was filed, denying payment. To this, defendant demurred, on the ground that the composition resolution was a bar to the action, and that plaintiff thereby acquired a new right and a new remedy under the bankrupt act. The demurrer was overruled, and the right to sue at common law sustained. The court says, 7 *L. R. C. P.*, *p.* 523. "The next question is whether an exclusive jurisdiction in the matter is vested in the Court of Bankruptcy. My impression is that it is not. A remedy is given in that court which may be very valuable—for instance, as respects parties coming in as sureties under the 280th rule. The creditor may avail himself of that course of proceeding if he thinks fit ; but his ordinary common law remedy still subsists until he elects to avail

himself of the powers of the Court of Bankruptcy." And again, p. 524: "Then it is said that the right to sue in a common law court is taken away and that exclusive jurisdiction is given to the Court of Bankruptcy. That argument is founded upon these words in §126: 'The provisions of any composition made in pursuance of this section may be enforced by the court on motion made in a summary manner by any person interested.' *It seems to me very difficult to see how the original agreement or resolution could be enforced after the lapse of a reasonable time; it would in effect be making a new agreement.*"

In re ***Hatton***, also cited above, was a case where application was made to the bankrupt court to enjoin proceedings at common law, instituted subsequently to the adoption of a composition resolution, and after a failure to pay. The injunction was *refused*.

Counsel for the executor object that these English decisions are not authority in our courts, because the English act and our act differ—the former providing for a composition without bankruptcy proceedings, whilst the latter provides the contrary.

Let us see whether this objection is well founded:

Section 126 of the English Bankruptcy Act of 1869, (32 and 33 Vict. c. 71) enacts that "the creditors of a debtor unable to pay his debts may, *without any proceedings in bankruptcy*, by an extraordinary resolution, resolve, etc." "The extraordinary resolution, together with the statement of the debtor as to his assets and

debts, *shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section, and, if satisfied that it has been so passed, he shall forthwith register the resolution and statement of assets and debts; but, until such registration has taken place, such resolution shall be of no validity.*" "The provisions of any composition made in pursuance of this section, may be enforced by the court on motion made in a summary manner, by any person interested; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court."

Section 127 makes the resolution conclusive evidence, in the absence of fraud, that all the requisitions of the act have been complied with.

It is undoubtedly true that the composition proceedings under the Englisn act begin outside of the bankruptcy court; but it is equally true that they are concluded in that court, which is as fully vested with authority over the same as our own U. S. District Courts. The whole difference between the two systems is that under one, the composition is made outside of the bankrupt court, but must be *ratified* by that court; whilst under the other the whole proceedings, including the composition, are *conducted in the court.* In neither case is a composition effective until sanctioned by a bankruptcy court. We invite the court to a careful comparison of the English act, as above summarized by us, and the American Statute of June 22, 1874, § 17. We be-

lieve that summary to be a fair and correct one, although we have been unable to find a copy of the act itself, and have relied upon quotations by counsel in the case of *Edwards vs. Coombe*, above referred to. The two acts undoubtedly differ in unessential particulars, but for all the purposes of this case they are identical.

The composition act does certainly provide a means of enforcing the composition in the bankrupt court, or of setting aside the composition and adjudging the debtor a bankrupt ; but this remedy is not exclusive of others, nor do we care to avail ourselves of it.

Counsel argued this branch of the case as though we were seeking to *impeach* a discharge, or to *annul* a composition. We are doing neither of these things. We say that the debt in this case has *never been discharged.* The issue here is simply *discharge* or *no discharge.*

Supposing that this question were raised in an ordinary suit, instead of upon an opposition to an account, how could the executor avail himself of any defense arising out his bankruptcy proceedings ? Could he object the the pendency of bankruptcy or composition proceedings ? No, because the proceedings have terminated. Could he sustain an exception that he is discharged in bankruptcy by composition proceeding ? Not at all, for one essential element to that defense is wanting, viz : the element of *payment* of the composition.

That payment is an essential element to a valid plea of discharge under composition proceedings, is shown not

only by the two English cases cited by us, and the two American cases decided by Judges Hunt and Emmons ; but by that same New Hampshire decision cited with such marked approval by the gentleman opposed to us. See 16 *N. B. R., p.* 207, at end.

We desire to call the attention of the court to the fact that we could not avail ourselves of any proceedings in the bankrupt court even if we desired to do so, and to the remarkable character of the defense set up by the executor. He refers us to the bankrupt court for our remedy, when he well knows that there is but one person in the world who can possibly appear in that court to enforce any claim of the estate of R. H. Bayly against the late firm of G. M. Bayly & Pond, and whose sworn duty it is so to do if he deems such a course the proper one, and that person is—G. M. BAYLY, EXECUTOR!!!

Whilst we believe that the decision of the Supreme Court of the State of Louisiana is correct, and that it will be affirmed by this Honorable Court, still we are not forgetful of the fact that decisions of respectability may be cited against us. Should this Court decide in favor of any of the positions maintained by plaintiff in error, then we desire to call its careful attention to the state of the

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record and pleadings in this case. The Court will note that the appeal from the judgment of the Second District Court for the Parish of Orleans was taken by the present defendant in error, and not by plaintiff in error, and that plaintiff in error did not appeal, nor join in our appeal, nor answer the same, nor pray in the Supreme Court of the State for any amendment of the judgment of the lower court. Under this state of the pleadings the State Supreme Court could not, under the law and practice of the State, make any change in the judgment of the lower court so as to render it more favorable to the present plaintiff in error.

Article 889 of the Code of Practice of the State of Louisiana reads as follows:

"But, if the appellee, on the appeal of the other party, neglect to pray that the judgment be reversed on those points which are prejudicial to him, he shall not afterwards be allowed to appeal, but the judgment shall remain irrevocable for or against him."

See also: Louisiana Code of Practice, Arts. 592, 887, 888, 890; 15 A. 222, 18 A. 642; 19 A. 527; 27 A. 185, and many other cases cited in Louque's Digest, *verbo* "Appeal," VI. (c).

It is, therefore, obvious that the only relief which this Court can grant to plaintiff in error, even if it should accede to his views, is to reverse the judgment of the State Supreme Court, with directions to said Court to affirm the judgment of the Second District Court. This

limitation upon the relief sought by plaintiff in error will in itself be of very great importance to us.

We, therefore, maintain:

(1) That the judgment of the Supreme Court of Louisiana should be affirmed;

Or, if it be reversed, then

(2) That the mandate to said Court should direct it to affirm the judgment of the Second District Court for the Parish of Orleans.

Respectfully Submitted,

HENRY J. LEOVY,

For Defendant in Error.